

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL
REVISED

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

EPIC GAMES, INC.,)	Status re Scheduling
)	of TRO Motion
Plaintiff,)	
)	
vs.)	NO. C 20-05640 YGR
)	
APPLE, INC.,)	Pages 1 - 23
)	
Defendant.)	Oakland, California
_____)	Wednesday, August 19, 2020

REPORTER'S TRANSCRIPT OF ZOOM WEBINAR PROCEEDINGS

APPEARANCES:

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(Appearances continued next page)

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A P P E A R A N C E S (CONT'D.)

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1 Wednesday, August 19, 2020

1:41 p.m.

2 P R O C E E D I N G S

3 (Zoom webinar)

4 **THE CLERK:** All right. Calling civil action 20-5640,
5 Epic Games versus Apple, Inc.

6 And, counsel, please state your appearances.

7 **MS. FORREST:** Good afternoon, Your Honor. For Epic,
8 it's Katherine Forrest with Cravath. I am joined by
9 Mr. Riehle from Faegre Drinker, and Mr. Bornstein, my partner
10 from Cravath. All three of us are here today for Epic.

11 **THE COURT:** Okay. Thank you.

12 **MR. DOREN:** Good afternoon, Your Honor. Richard
13 Doren from Gibson, Dunn & Crutcher on behalf of Apple. And
14 I'm joined by Karen Dunn from Paul Weiss.

15 **THE COURT:** Okay. Good afternoon, everyone.

16 All right. Well, I just received this case on a related
17 motion. I understand you have a TRO that is in the process of
18 being briefed. I understood from Judge Chen's chambers that
19 you had done some measure of discussion with respect to
20 briefing. But given that it's now my case, I thought I would
21 just get you on the phone or the platform quickly for a very
22 short scheduling conference.

23 So can someone let me know what the status is and whether
24 there have been any discussions whatsoever about trying to
25 maintain the status quo in this case without over-litigating

1 something?

2 **MR. DOREN:** Your Honor --

3 **MS. FORREST:** Your Honor, I can start if that would
4 be acceptable to the court. Katherine Forrest for Epic.

5 We -- I did, upon receiving the court's notice that you
6 wanted to have this conference this afternoon, reach out to
7 other outside counsel for Apple, some of the individuals from
8 Gibson Dunn whom we've been communicating previously about
9 this, and talked to them a little bit about the briefing to
10 see what -- where they are.

11 Judge Chen had just originally set the opposition papers
12 for Apple for Friday with argument Monday. That was obviously
13 acceptable to us because it was the court's desire.

14 We asked Apple if they could comply with that because we
15 would like this to be heard as quickly as possible. They
16 suggested that their briefing go in on Monday and the hearing
17 as soon thereafter as the court can accommodate the hearing.

18 Our issue -- and it's really obviously up to the court's
19 calendar as quickly as you can hear this. Our issue is that
20 there is really very significant ongoing harm that is
21 happening every single day that I can describe to the court
22 but that make really any kind of extension difficult for us to
23 agree with.

24 Obviously, the court will set a schedule for the hearing
25 that meets with your other responsibilities and whatever else

1 you've got on calendar, but we would like to have this heard
2 as quickly as possible.

3 So from the Epic perspective, our strong preference would
4 be to have the papers coming in on Friday, even over the
5 weekend, and to have a hearing on Monday if the court could
6 accommodate that.

7 If you'd like, I could also just describe very briefly why
8 we think this particular case is not amenable to a status quo
9 resolution that would obviate the need for a TRO or we can
10 hear from -- you can maybe hear from Apple, whatever you would
11 like, Your Honor.

12 **THE COURT:** But what my question was whether you had
13 talked to each other about it, right?

14 **MS. FORREST:** We did start --

15 **THE COURT:** Let me finish.

16 **MR. DOREN:** Your Honor --

17 **THE COURT:** Apple -- both Apple and Epic Games are in
18 my courtroom all the time. All the time. So -- and obviously
19 there's -- there's lots of news articles happening about
20 what's going on and the alleged harm and everything else.

21 The underlying issues in this case are going to be decided
22 in a reasoned regular process. The question is, can the
23 events which led to the filing of the TRO be rolled back to a
24 point where no third parties are being harmed, where we can
25 stop, right, with the status quo -- remember, you don't get

1 TRO just because of money damages. There has to be more than
2 that. It's extraordinary relief. You are both major
3 corporations, and you can calculate what the money damages
4 are.

5 But from what I understand by the press, because I haven't
6 seen your papers and the press is much shorter in what they're
7 saying the alleged damage is, there are other parties who are
8 being affected.

9 You are all preeminent litigators. And the question is
10 can you pick up the phone and figure out how to resolve this
11 in a way so that the underlying litigation can proceed in a
12 normal way.

13 Who can answer that question?

14 Mr. --

15 **MS. FORREST:** Your Honor, I --

16 **MR. DOREN:** Your Honor --

17 **THE COURT:** Go ahead, Mr. Doren.

18 **MR. DOREN:** Thank you, Ms. Forrest. Richard Doren
19 for Apple.

20 The -- the issue, of course, Your Honor, is that, as
21 you've read in the paper, a little bit over a week ago, Epic
22 did what they call a hot fix into their game which directed
23 people away from the App Store and toward the Epic website
24 where they would then be paying Epic directly and
25 circumventing the Apple in-App payment system.

1 The -- the damage being done to Apple here is more than
2 monetary. It's -- it's also reputational in terms of there
3 being this diversion outside of the App Store. And it's also
4 potentially harmful to the App Store structure itself.

5 So we do agree that we can go back to status quo until
6 these issues are resolved. But it would need to be the status
7 quo before this hot fix was implemented by Epic in the App
8 Store.

9 **THE COURT:** Mr. --

10 **MR. DOREN:** As Your Honor says, it's a monetary issue
11 from that point forward, and there are --

12 **THE COURT:** Well, I --

13 **MR. DOREN:** -- experts that can testify as to --

14 **THE COURT:** Mr. Doren.

15 **MR. DOREN:** Yes, Your Honor.

16 **THE COURT:** Ms. Forrest, go ahead, respond.

17 **MS. FORREST:** Yes. Part -- Your Honor, the issue is
18 that as part of the retaliatory acts that Apple undertook
19 after Epic had taken the actions that it took on August 13th,
20 was the release of information which now the developer
21 community is aware of which indicates that they will no longer
22 support something called the Unreal Engine which is a
23 third-party developer platform used around the world.

24 That has resulted immediately in uncertainty from the
25 developer community as to whether or not they actually have a

1 platform they can develop on which includes not only new
2 applications but also updates and fixes and things of that
3 nature.

4 So we are receiving every single day concerns, complaints,
5 questions about the tremendous uncertainty now that has been
6 put into the developer community on that basis.

7 So even if we go back to August 13th, the -- the status
8 quo ante, if you will, which we would suggest would include
9 the inclusion of our Epic pay system, that would no know way
10 resolve this other issue, which is that there is a now very
11 significant level of uncertainty hanging over the developer
12 community about the status of our platform.

13 So the -- the developers are not right now able to
14 continue with the same kind of trust and confidence to utilize
15 our platform. So we believe that we need to have an answer on
16 the TRO and whether or not in the short term Apple will be
17 able to implement the retaliation that it has suggested in its
18 letter to us that it intends to -- to do.

19 **THE COURT:** Mr. Doren. Mr. Doren.

20 **MR. DOREN:** Your Honor, brief comment? Thank you.

21 The reason that the risks are presented to Epic that were
22 just framed is because Epic actually changed the status quo.
23 And is now seeking to freeze things in this new -- in this new
24 world that it created on August --

25 **THE COURT:** Can you -- can you just -- can you

1 address very quickly this Unreal Engine issue and --

2 **MR. DOREN:** Yes.

3 **THE COURT:** -- the developer certificates, and the
4 impact on third parties.

5 **MR. DOREN:** Yes, Your Honor.

6 If we roll things back to status quo ante, as counsel
7 referenced, in other words, before Epic put in this diversion
8 that we're -- to sending things outside of the App Store,
9 there would be no risk to support the Unreal Engine.

10 We would be, as Your Honor said, at status quo. We would
11 be moving forward through this litigation with the Unreal
12 Engine being supported once a compliant -- once a compliant
13 Fortnite game is on the App Store.

14 We will then be at status quo ante. The Unreal Engine
15 will be supported by Apple. The developers of the Unreal
16 Engine will have access to all current tools through the IOS
17 platform. And Your Honor will have an opportunity to address
18 all issues with everything going forward as they had been
19 before August 13th when it was Epic changed the status quo.

20 **THE COURT:** So why is that you are impacting the
21 Unreal Engine at all?

22 **MR. DOREN:** Because, Your Honor, Apple has a
23 contractual right to take -- to quit supporting those games
24 that Epic has developed from -- or that rely on the Epic
25 platform, and we have informed Epic that if it does not cure

1 the breach of its contract, which it -- which it performed
2 by -- [connection issues distorting audio] -- and diverting
3 payors and diverting users off of the App Store, that those
4 Epic-supported games would be taken down off the App Store.

5 That's within Apple's contractual rights, and it has to do
6 that in order to protect the integrity of the App Store. And,
7 Your Honor, the way to protect the integrity of the App Store
8 and to protect Epic's concerns about the Unreal Engine is to
9 take everything back to the day before they used this hot fix
10 to basically sabotage the App Store and redirect payments to
11 the Epic website.

12 And in that environment, their games will be supported.
13 The Unreal Engine can continue to gain access to the App -- to
14 the Apple software and other developer tools and all will
15 proceed, as they always have been, until this court reaches
16 its final conclusions.

17 **MS. FORREST:** Your Honor, might I respond briefly?

18 **THE COURT:** You might.

19 **MS. FORREST:** All right.

20 One issue is that the Unreal Engine is not party to the
21 same contractual arrangements that are applicable to Fortnite
22 and -- which is one of the reasons, as we laid out in our
23 papers, where the retaliation against the Unreal Engine is
24 reaching really a reaching outside of the contractual
25 arrangements that is -- that is there. It's a different

1 company. It's in Switzerland. It's a totally different set
2 of circumstances. So it is not a matter of apples to apples
3 there, Your Honor, so to speak.

4 The second --

5 **THE COURT:** Is it the same contract or not,
6 Mr. Doren?

7 **MR. DOREN:** There's two different contracts, Your
8 Honor.

9 **THE COURT:** So you're -- you're reaching to a second
10 contract to apply pressure because you don't like what Epic
11 Games did. That's what it sounds like to me.

12 **MR. DOREN:** No -- But, Your Honor, they -- but the --
13 the -- the apps that fit within these contracts. The terms
14 are the same. The modifications made by Epic to the payment
15 mechanism impact both contracts because Epic has other
16 payment -- has other apps on the store, and it's essentially,
17 Your Honor, that the App Store payment mechanism, the IAP --
18 [connection issues distorting audio] -- process, be respected
19 throughout --

20 **THE COURT:** The contract --

21 (Simultaneous colloquy.)

22 **THE COURT:** Mr. Doren, the contract that deals with
23 Fortnite, does it -- it's a fully integrated contract, isn't
24 it?

25 **MR. DOREN:** Your Honor --

1 **THE COURT:** Is it, "yes" or "no," Mr. Doren? "Yes"
2 or "no"?

3 **MR. DOREN:** It's an integrated contract, Your Honor.

4 **THE COURT:** Right? And it has rights,
5 responsibilities, it has damages provisions, doesn't it?

6 **MR. DOREN:** Your Honor, there are provisions in that
7 contract that are being breached today that include and impact
8 the Unreal platform.

9 And, Your Honor, if -- if there -- if this is going to be
10 permitted to proceed and Apple is not going to be permitted to
11 exercise its contractual rights, then we would need brief this
12 to the court and set it out in chapter and verse for the court
13 to be able to see why this is a breach under these contracts
14 and why the conduct by -- by Epic is inappropriate.

15 **MS. FORREST:** Your Honor, the app --

16 **THE COURT:** All right. So it sounds like -- it
17 sounds like I need to deal with the TRO by Monday, and then
18 perhaps we have briefing on a preliminary injunction. I mean,
19 I -- you know, what --

20 **MR. DOREN:** Your Honor --

21 **THE COURT:** What you want me to do is -- is you
22 billion-dollar companies want me to drop everything and deal
23 with your papers over the weekend because you can't on your
24 own seem to put a temporary stop so we can deal with this even
25 in the context of an injunction.

1 **MR. DOREN:** Your Honor --

2 **THE COURT:** -- that's what we're going to do, right?

3 **MR. DOREN:** Two -- two comments. First of all, we
4 have -- I think both sides have said they're willing to talk.
5 And we were responding to the court's questions. We're happy
6 to have that discussion.

7 But second of all, Your Honor, nothing is going to change
8 and this discussion about taking anything else off the App
9 Store does not occur until -- until the 28th. And what we
10 would ask, Your Honor, is for an opportunity to submit our
11 briefs on Monday and have the court hear the matter at its
12 convenience after that point.

13 And if it -- if it helps the court in terms of scheduling
14 that, then we could certainly agree to leave the current
15 status quo in place for the additional days or time that the
16 court needs before it hears that TRO.

17 **THE COURT:** Ms. Forrest.

18 **MS. FORREST:** Yes.

19 Your Honor, one thing I would just like to correct is that
20 the Unreal Engine has nothing to do with the Apple App Store.
21 It has nothing to do with Epic Pay. It's a platform on which
22 third-party developers actually write new applications so this
23 is really apples and oranges. Let's leave to the side for the
24 moment.

25 We do agree, Your Honor, that a hearing at the court's

1 earliest consequence is appropriate and necessary. We
2 apologize for the fact that it's occurring when it's
3 occurring. But the speediest schedule that Your Honor is able
4 to have, we would like to comply with.

5 We would, in fact, be able to do it sooner than that. We
6 could do it on Friday if the court wanted to do it orally and
7 not have written submissions, but, obviously, Apple would like
8 to put in something in writing.

9 In terms of the harm, I do want to just reiterate that
10 it's not about August 28th or August -- you know, or rolling
11 it back to the status quo ante. What we've got is a developer
12 community right now that so long there's uncertainty hanging
13 over the platform, we are receiving, as I've already said,
14 extraordinary levels of concern, so --

15 **THE COURT:** But, Ms. Forrest, your client -- look,
16 Epic Games knew what it was doing, right? It decided to take
17 a stand, which is fine. It implemented what they're calling
18 this "hot fix" and immediately filed a complaint. So it knew
19 exactly what it was doing.

20 The problem is, is that it didn't quite anticipate the
21 kind of response that it got from Apple. So that -- you know,
22 you created the situation by doing what they did. You don't
23 come into this fight with clean hands.

24 **MS. FORREST:** Your Honor, you are correct that Epic
25 absolutely understood that it was implementing its own payment

1 service when it did so on August 13th. However, it is very
2 much of the view that the contractual provision that Apple has
3 in place that prevents an alternative payment service is, in
4 fact, un- -- unlawful. And so that Epic was not acting
5 contrary to the law.

6 In any event, Your Honor, your other point is also
7 correct, which is that when Apple undertook retaliation,
8 which, of course, Epic had considered as a possibility, it did
9 so in a very broad and far-reaching way so that it could
10 actually harm, really, at this point it would be hundreds of
11 developers and millions and millions of users all over the
12 world relating to the Unreal Engine.

13 That's not part of game theory, Your Honor, relating to
14 the Fortnite game or something of that nature. It's something
15 entirely different.

16 **MR. DOREN:** Your Honor, may I?

17 **THE COURT:** You may.

18 **MR. DOREN:** The -- the current situation is this:
19 The -- the one game Fortnite, updates to that game and that
20 game have been taken off of the App Store site. People who
21 have Fortnite on their iPhone can continue to use it, and no
22 other Epic game and nothing to do with Unreal is currently
23 impacted. The only thing impacted is the ability to update
24 the Fortnite game, that single game.

25 So I hear Your honor's concern and Your Honor's desire to

1 give this the consideration it deserves in the appropriate
2 amount of time. And if Your Honor is so inclined to have this
3 be addressed at a preliminary injunction stage with the
4 current status quo in place, with that being done on the time
5 that gives the court the time necessary to evaluate the
6 arguments and to make its ruling, with -- with everything in
7 front of it, we would certainly invite that opportunity and --
8 and to use that as a way to address this issue with the court.

9 **MS. FORREST:** Your Honor, might I just respond to one
10 factual statement that was just said?

11 **THE COURT:** You may.

12 **MS. FORREST:** Mr. Doren stated that right now, the
13 users on the Apple platform using IOS on the mobile devices
14 would be able to continue to use their phones to play
15 Fortnite.

16 In fact, Your Honor, there are very, very significant
17 issues even with that in the short term, which is, as Your
18 Honor may be aware, Fortnite is one of the games which has
19 opened up cross-platform and cross-device play across the
20 world that allows for a social environment to be created
21 across the PS4 and/or mobile devices, Androids can talk to
22 iPhones.

23 What that really means is that every time there is a
24 single new update, any kind of fix, at that point in time, the
25 Apple users can no longer talk to the android users. They can

1 no longer play with the PS4 users, so there's a complete
2 breakage of the connection between those platforms.

3 So this is an issue that's not just something isolated to
4 the iPhone, Your Honor. It's related to a variety of
5 platforms that really reach worldwide. These people are
6 playing worldwide with each other, and it's cutting the Apple
7 users off from that worldwide play with these other platforms.

8 **THE COURT:** Ms. Forrest, why not, then, roll back to
9 before the hot fix? There's no response, then, from Apple,
10 and we put this on for preliminary injunction?

11 **MS. FORREST:** Your Honor, the reality in the
12 developer community is that so long as they understand that
13 the issue of this extraordinary retaliation against the Unreal
14 Engine is still out there, they're not going to trust or have
15 confidence in the Unreal Engine as a viable platform. They're
16 going to start making decisions. We've already got
17 information that we can bring to Your Honor on that. We
18 can't --

19 **THE COURT:** Ms. Forrest -- Ms. Forrest, a TRO only
20 lasts a certain amount of time. You know that. I have to get
21 to a preliminary injunction stage.

22 **MS. FORREST:** Your Honor, we certainly appreciate
23 that. We know that -- that the TRO could, however, be a
24 moment where Your Honor could agree with us that the Unreal
25 Engine should not be included in the retaliatory acts, that

1 whatever Apple can do as a result of whatever it believes its
2 wrong have been would not relate to the Unreal Engine. We can
3 eliminate that as an issue in this case, as it would be proper
4 to do.

5 So having the TRO be resolved and the Unreal Engine out of
6 this case is extraordinarily important.

7 **THE COURT:** So your TRO only relates to the Unreal
8 Engine?

9 **MS. FORREST:** It does not, Your Honor. The letter --

10 **THE COURT:** That's my point. Isn't it?

11 **MS. FORREST:** Well -- it is your point. It is
12 absolutely is your point. We would, though, be having a
13 different conversation if we only had one letter that dealt
14 only with the Fortnite application.

15 In fact, the letter puts this -- the retaliatory acts
16 together and integrates the retaliatory acts together across
17 all of Epic's properties beyond Fortnite into the Unreal
18 Engine.

19 And in addition to that, the -- the -- with respect to
20 Fortnite in and of itself, it's preventing the consumers
21 right now, as I've just mentioned, from being -- these Apple
22 users from being able to play cross-platform with anybody else
23 so long as there is -- we are off their -- off their App
24 Store.

25 **MR. DOREN:** Your Honor?

1 **THE COURT:** Mr. Doren.

2 **MR. DOREN:** Epic has -- Thank you, Your Honor.

3 Epic has unilaterally breached the contract and created a
4 crisis of its own making and is now coming to the court and
5 asking for immediate relief from that crisis.

6 What we are asking for, Your Honor, is that this be
7 addressed in a methodical and practical way to get us all to
8 the right answer and giving the court the time it needs to
9 achieve that result.

10 When currently in -- in the Fortnite game, when someone
11 goes to make an in-app purchase, a screen pops up inviting
12 them to redirect them to the Epic platform to make these in
13 app purchases for a price lower than those being made in the
14 Apple App Store. Apple is losing money every hour as that
15 remains on the website.

16 And -- and this is by the product of Epic's willful breach
17 of its contract with Apple. It -- and Apple's conduct to this
18 point has only impacted that one game, Fortnite. As Your
19 Honor has suggested, if we roll everything back to the day
20 before that hot fix, this will all proceed, all of the
21 cross-platform users will have the ability to communicate, to
22 upgrade, to update. Everything will proceed as it is. And
23 all the developers will know that they have access to IOS
24 upgrades and updates and Apple software and everything that
25 they have now in order to further develop products on the

1 Unreal platform.

2 That's the status quo. That's what will give -- that's
3 what will maintain the status quo and permit us to present to
4 you, Your Honor, in the context of a preliminary injunction
5 briefing and a full hearing the merits on these issues.

6 **MS. FORREST:** Your Honor, one thing I would just like
7 to say is that we are currently off the Apple platform. There
8 is no purchasing or in-app purchasing that is occurring today.
9 Every hour, there is -- none of that is happening. They took
10 us down. They took us down within hours, so that is
11 absolutely not happening.

12 Your Honor, we would suggest that if there is as status
13 quo ante, that that status quo ante be with the Epic store
14 being able to be offered so that consumers can take advantage
15 of a lower price. There is no security issue that we are
16 aware of that should prevent that. The app can go back up.
17 Users can continue to play -- to play -- to play Fortnite.
18 They can take advantage of the lower price. If there is an
19 issue there that we later lose on, then we would pay damages.

20 Our lawsuits suit seeks solely injunctive relief. This is
21 not a lawsuit where Epic is actually seeking damages. We have
22 actually specifically indicated in our complaint that we are
23 not seeking damages. We are seeking to provide lower -- lower
24 prices to consumers through our -- through our app, through
25 the Fortnite.

1 **THE COURT:** All right.

2 Apple's opposition, noon on Friday on the TRO.

3 We'll have oral argument Monday -- I have a trial
4 conference in the morning. I can't get to you until
5 3:00 o'clock Monday afternoon.

6 **MS. FORREST:** Your Honor, you also have a -- a -- we
7 saw in the -- in the clerk's minute order that you have a --
8 you're part of pilot program relating to cameras in the
9 courtroom. We don't know whether or not that is still
10 something that you are doing --

11 **THE COURT:** Ms. Forrest, I'm just going to interrupt
12 you 'cause I'm now late for my criminal calendar, but this --
13 what we have done here in the Northern District of California
14 is to agree to use the Zoom webinar feature.

15 Right now, you're effectively on camera. Anybody who is
16 an attendee who's not calling in by phone and clicks on the
17 link can -- can watch the proceedings. We use the webinar
18 feature specifically to allow that kind of video access.
19 Cameras in the courtroom is a very different program. I mean,
20 we physically have to have multiple cameras in the courtroom.

21 In our criminal hybrid courtrooms right now, we don't even
22 use that. What we are using is that -- is multiple computers
23 on a Zoom platform to create a hybrid courtroom where the
24 defendant and the criminal lawyers and the court who are
25 actually in the courtroom have cameras on them. And then

1 everybody else participates remotely. Our CRD's are
2 participating remotely, Probation, court reporter -- I mean --
3 yeah, our court reporters as well.

4 So I cut you off because that -- that's not actually a
5 program that we can use in light of COVID.

6 **MS. FORREST:** Understood.

7 **THE COURT:** But effectively, that is what we are
8 doing, and --

9 **MS. FORREST:** Thank you.

10 **THE COURT:** -- the -- the link will -- will be
11 available on the docket. It will actually be the exact same
12 link that you have right now. This is the link that I use for
13 this platform.

14 In order to assist me, we will be sending you
15 confidentially by email a -- addresses to send the briefing by
16 overnight mail so that we can start working on these topics to
17 be ready for Monday afternoon.

18 **MS. FORREST:** Thank you.

19 **MR. DOREN:** Thank you, Your Honor.

20 **THE COURT:** All right?

21 Have a good weekend. Thank you.

22 We're adjourned.

23 **MR. DOREN:** Thank you, Your Honor.

24 **MS. FORREST:** Thank you, Your Honor.

25 **MR. RIEHLE:** Thank you, Your Honor.

(Proceedings were concluded at 2:09 P.M.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

A handwritten signature in black ink, reading "Raynee H. Mercado", is written over a horizontal line.

Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

Thursday, August 20, 2020